footing of a purchase of property, and consequently a tender of the certificate of stock is not a condition precedent to an action on the subscription: R. R. *v.* Dunn, 17 Ind., 603; Slipher *v.* Earhart, 83 Ind., 173; Wemple *v.* R. R., 120 Ill., 196; Marson *v.* Deither (Minn.), 52 N. W. Rep., 38.

As a general rule, the Statute of Limitations does not begin to run against a subscription to stock until a call is made, either by the company or by a court of competent jurisdiction: Williams *v.* Taylor (N. Y.), 24 N. E. Rep., 288; S. C., 120 N. Y., 244; Semple *v.* Glenn (Ala.), 9 So. Rep., 265; Glenn *v.* Priest, 48 Fed. Rep., 19; Glenn *v.* Marbury, 145 U. S., 499; S. C., 12 Sup. Ct. Rep., 914; but if the call be not made within a reasonable time, the company will not be allowed to avail itself of its failure in the premises to defeat a defense of the statute: Great West. Tel. Co. *v.* Purdy (Iowa), 50 N. W. Rep., 45. In Pennsylvania the law presumes an abandonment of the right to call after six years from the date of incorporation, in analogy with the statute: R. R. *v.* Byers, 32 Pa., 22; McCully *v.* R. R., 32 Pa., 25; R. R. *v.* Graham, 36 Pa., 77; Bank *v.* Ferguson, 20 W. N. C., 297; Bank *v.* Disston, 4 Pa. C. C. R., 201; Bell's App., 115 Pa., 88; but when the corporation has made an assignment for the benefit of creditors, the statute runs from the date of the assignment: Bank *v.* Bridges, 8 Atl. Rep., 611.

R. D. S.

DEPARTMENT OF EQUITY.

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IN RE FRASCH.[1] SUPREME COURT OF WASHINGTON.

Where there are secured and unsecured creditors of an insolvent, the secured creditors must first exhaust their security, apply the proceeds to the diminution of their claim, and then share *pro rata* with other unsecured creditors on the balance of their claim.

DISTRIBUTION OF INSOLVENTS' ESTATES AMONG CREDITORS WITH AND WITHOUT COLLATERAL SECURITY.

The doctrine that one who has two funds open to him for the payment of his claim shall not take that which is the sole dependence of another, has long been established as a favorite in courts of

[1] 31 Pac. Rep., 755.

equity, though there is some difference of opinion as to its origin: Aldrich *v.* Cooper, 8 Ves., 388. On the one hand, it is claimed that the equity to compel a creditor to resort to the singly charged fund is an equity against the debtor, and the reason for this opinion is found in the fact that before lands were made liable for the payment of simple contract debts the satisfaction of a specialty creditor out of the personalty of a deceased or insolvent debtor relieved the realty from all liability: Aldrich *v.* Cooper. 2 W.& L. Cas. Eq., 264. On the other hand, it is claimed that the equity is one which exists against the doubly-secured creditor, and rests upon the famous principle, *sic utere tuo ut non alienum lædas:* Story's Eq. Jur., § 633, 13th ed. Whatever its origin, the doctrine is well recognized, but there is a class of cases in which the practical difficulties in the way of its application have given rise to an unwillingness to compel a resort to the singly-charged fund, many courts preferring to administer justice through the doctrine of subrogation.

The class of cases alluded to embraces all cases which involve the distribution of the assets of an insolvent debtor under proceedings in bankruptcy and insolvency, and under assignments for the benefit of creditors. Of these three methods it is only necessary to say here that there is very little difference between them, since the abolition of imprisonment for debt, the one object for which they were all created being to secure the application of an insolvent's estate to the equal and equitable satisfaction of the claims against it.

The question suggested by the principal case is a comparatively new one for most of the States, and the few authorities upon it are conflicting. These may be ranged under three heads: (I) Those which, as in the principal case, favor the doctrine of compulsion; (II) Those which have adopted what may be called the trust-fund theory; (III) Those which favor the doctrine of subrogation.

I. *Those which Favor the Doctrine of Compulsion.*—In Wurtz *v.* Hart, 13 Iowa, 515, which was a case of an assignment, a creditor filed a bill to prevent certain other creditors, to whom had been given security for their claims, from receiving a dividend upon the original debt. The Court took the view that in such cases collateral was equal to payment, and compelled the secured creditors to exhaust their separate funds, thus reducing their claims *pro tanto.*

The case of Third Nat. Bank *v.* Lanahan, 66 Md., 461, which was also that of an assignment, presented a slightly different question, whether a secured creditor who has realized upon his collateral after the assignment, but before proving his claim, can demand a dividend upon the full amount of his original debt. As was pointed out by the Court, the case did not involve the marshaling of securities, but merely the ascertainment of the real amount of the claim, and they refused to allow the dividend on the ground that it was the duty of the trustee under the terms of the assignment to pay ratably and equally according to their respective amounts only such debts as were owed by the assignor. "The obligation of the trustee to pay does not depend upon the state of the account between the creditor and the assignor at the time of the as-

signment, but at the time *when payment is to be made.*"

Amory *v.* Francis, 16 Mass., 308, involved the proper distribution of the estate of an insolvent intestate, a creditor of whom, secured by a mortgage, demanded to be allowed to prove his whole debt and to receive a dividend upon that sum. Chief Justice PARKER strongly commended the doctrine of marshaling for such cases, since in his judgment the rule which required the creditor to exhaust his security would operate to prevent gross irregularity between the creditors, and secure a distribution of the estate among all *pro rata.* Nor was he deterred by the difficulty in applying this rule, which springs from the fact that there is no power to compel the creditor to sell the mortgaged property. The same difficulty was felt in Bell *v.* Fleming, 12 N. J. Eq., 13, but the rule was, nevertheless, approved. The difficulty, however, is not great, for the assignee may either compound the value of the security with the creditor, or failing in the agreement, can file a bill to compel a sale of the property. See, also, Bristol Bank *v.* Woodward, 137 Mass., 412. But it seems probable that the desire of the secured creditor to participate in the distribution would remove the difficulty by leading him to take the initiative.

In Wheat *v.* Dingle, 32 S. C., 473, which was also a probate case, the question was again raised whether a creditor having real security upon which he has realized, after proof of his claim, should receive a dividend upon the claim as proved. The Court held that he could not. In this case a distinction was made between security which is part of the estate itself, and security furnished by third persons. The latter is not liable to the claims of the general creditors of the estate, and they have no right to claim any benefit from its use; in other words, there can be no marshaling unless both funds belong to the estate. The distinction seems to be founded on reason and equity: Dickson *v.* Chorn, 6 Iowa, 19.

The argument which runs through all these cases is that this rule of compulsion is best calculated to produce an equal distribution among all the creditors; for otherwise collateral would give to the creditor an advantage which it was not intended he should have, would in fact, whatever its proportion to the debt, practically operate as security for the whole. In justice, however, to the unsecured creditors the partially secured creditor should stand on an equal footing with them as regards the amount by which his security is less than his debt. The argument is thus illustrated in the principal case: A assigns his estate, worth $15,000, including security, in the hands of B, worth $5000. B has a claim against the estate of $5000, secured as mentioned above, and an unsecured claim of $5000. C has an unsecured claim of $10,000. Deducting the securities from the assets, the estate has $10,000 with which to pay claims aggregating $20,000, and as a consequence pays fifty cents on the dollar. B is allowed a *pro rata* on his whole claim of $10,000, which gives him $5000. He then makes the other $5000 out of his security, and in consequence has his whole debt paid in full. Thus, on his unsecured debt of $5000, he receives $5000, while C, on his unsecured debt, receives only $2500.

In support of this view the criti-

cism in Bell *v.* Fleming, *supra*, of the decision in Greenwood *v.* Taylor, 1 Russ. & My., 185, is significant. "If he (the Master of the Rolls) had simply declared that he would adopt the rule (of compulsion) upon the broad ground that equality is equity, it is quite probable it would have been followed without its propriety being questioned."

II. *The Trust Fund Theory.*—This view is at present confined to Pennsylvania and Rhode Island, and has been stated very clearly in a case in the former State: A creditor whose debt was represented by three judgments against the insolvent, for which he had certain security, had, after the assignment but before a dividend had been declared, realized on the said security enough to satisfy two of the judgments in full and the third in part. The Supreme Court, per SHARSWOOD, J., overruling the court below, decided that he was entitled to a dividend upon the amount of his original claim, on the ground that an assignment is an appropriation by the debtor of his estate for a specific purpose for which it was already liable. It is, in fact, a trust for all the creditors *then* existing *pro rata* without regard to the nature of any security they might hold. The relation of creditor is changed to that of equitable owner, and the interest of any one of them extends to the amount of his whole original claim. If in this case the creditor had not realized on the land he could have claimed a dividend on the whole debt, and payment of part of it did not affect him because his right was fixed as one of the original *cestuis que trust.*, and he stood on that until his entire interest should be extinguished: Graeff's App., 79 Pa., 146; and see Miller's App., 35 Pa., 481; Patten's App., 45 Pa., 151.

The same theory is practically adopted in Rhode Island in a case where the assignment was for the equal benefit of all the creditors in proportion to their respective claims: Allen *v.* Davidson, 15 R. I., 480, overruling an earlier case which had adopted the doctrine of compulsion: *In re* Knowles, 13 R. I., 90.

These are certainly extreme cases. Part payment of a debt ought under all circumstances to operate as a *pro tanto* discharge of it, and there seems to be no valid reason why a payment made after the assignment should not be treated in the same way that it would have been if made before. It is inequitable to the other creditors that that which is no longer a claim should still, by a fiction, be considered one.

At all events, this theory would hardly apply to probate cases.

III. *The Doctrine of Subrogation.*—This is the more general rule, and the argument in support of it is based upon the principle that a creditor having a double security has a right to proceed against both and make the best he can out of both. The general doctrine of compulsion is approved, but the courts point out that such cases as those under discussion come within the proviso to that doctrine, namely, that it will not be applied when it will trench upon the rights or operate to the prejudice of the party entitled to the double fund. This is stated in a case where the secured creditor had three different funds, neither of which was sufficient of itself to

pay the whole claim. The Court refused to reduce the claim by the amount which the creditor had received from a sale of his securities, and allowed a dividend upon the whole original amount: Logan *v.* Anderson, 18 B. Mon., 114; and see City Bank *v.* Patterson, 78 Ky., 291.

In Illinois the same rule was applied, as carrying out the provisions of the statute governing such cases, to the case of a creditor who was secured by a deed of trust of certain land, but who had proved her claim to the full amount. The assignee proposed to pay her a dividend after subtracting the value of the security, but the Court, following what it declared to be the weight of authority, ordered a dividend to be paid on the amount of the claim as proved. Additional reason for this was found in the terms of the statute, which provided that all debts and liabilities should be paid *pro rata*. The original claim was part of the existing indebtedness, and, "if she does not get a distributive share on the full amount of her claim it cannot be said that the assets of the assignment have been paid *pro rata* upon the existing indebtedness:" Paddock *v.* Bates, 19 Ill. App., 470, and see *In re* Bates, 118 Ill., 524.

Michigan has also adopted this rule: Third Nat. Bank *v.* Haug, 82 Mich., 607, though Judge MORSE delivered an able dissenting opinion. In this case, where the rule was applied to the claim of a mortgagee despite the fact that he had realized upon his security, the Court considered that the question was ruled by the case of Southern Michigan Bank *v.* Byles, 67 Mich., 296, but in that case payment upon the claim had been made by third persons.

This rule has recently found favor in New York, notwithstanding the earlier case of Besley *v.* Lawrence, 11 Paige Ch., 581, which strongly asserts the doctrine of marshaling. The receivers of an insolvent corporation objected to the proof of a claim in full by a creditor who had already realized largely on collateral securities which he held, but the Court ruled that a secured creditor can bring in his whole claim and have dividends accordingly. To rule otherwise would be to hold that the contractual relations of a debtor and his creditor were changed by insolvency, a view which the Court emphatically disclaimed. By his contract the creditor has a right to hold the security until his debt is fully paid, and there is no principle of equity which can compel him to part with it before that time. Of this case it may be said that it is hard to see the connection between the premise and the conclusion; in other words, how refusing to compel the creditor to exhaust his security involves refusing to accept it as payment when he himself exhausts it.

Almost all of the cases which refuse to apply the doctrine of compulsion are cases where the creditor had security on realty. In the case of mortgages the Court has generally been deterred by the difficulty of compelling a foreclosure or of estimating the value of the security in case of refusal to compound: Findlay *v.* Hosmer, 2 Conn., 350; Moser *v.* Raubet, 2 N. H., 488; Walker *v.* Barker, 26 Vt., 710. But where the mortgagee has already converted his security into money and thereby reduced his claim,

there would seem to be no difficulty in the way of restricting the dividend to the remaining portion of such claim: West *v.* Bank of Rutland, 19 Vt., 403. It is no longer a question of compulsion, for the creditor of his own accord has used his security, and all that is asked is that a just and proper effect be given to his act.

The difficulty with this class of cases lies in their maintaining that insolvency leaves the contractual relations between debtor and creditor unchanged; that is, that the right which the latter had, should he sue the debtor, to disregard the security ought still to be his when he comes to prove his claim. In answer to this position it may be said, (1) that a creditor who exhibits his demand for a dividend has somewhat changed his relation to the debtor, inasmuch as he has given up the right to a personal suit upon his claim; (2) that a different personal equity is involved, the equity of fellow creditors, the *quality* of whose claim is not affected by lack of security.

The whole estate is practically in court, and the object of courts of equity in distributing an estate among its creditors is to make that use of every portion of it which will satisfy as far as possible, and with strict impartiality, all claims in proportion to their several amounts. The possession of security gives no peculiar virtue to a creditor's claim, for he has nothing more than a lien upon the property conveyed. The priority which is thus given to his claim would seem to be a sufficient reward for his diligence. The fund is limited, all are entitled to share in it upon an equal basis, and the unsecured creditors have a right to ask that a secured creditor, who is, in fact, partially unsecured, should be so considered.

Several of the States have settled the matter by statutes in which they have practically embodied the 20th section of the Bankruptcy Act of 1867, which provided that the creditors who held security had the option either to prove for the balance of their claim or to surrender the property held as security, and prove for their whole debt.

Such is the law in California (Insolv. Act, 1880, § 44; App. to Civil Code); for rights of a mortgagee, see Montgomery *v.* Merrill, 62 Cal., 385; Indiana (Rev. Stat., 1888, § 2674, ch. 13); Massachusetts (Pub. Stat., 1882, c. 157, § 28); New Hampshire (Pub. Stat., 1891, c. 201, § 20); Texas (1 Sayle's Civ. Stat., Art. 65n., p. 67); Vermont (Rev. Laws, 1880, § 1802).

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NOTE.

How very much the problem of the relative rights of creditors on different securities would be simplified if the meaning of words always used in stating the rule was only attended to! The only pretence for interference with a creditor having several securities in favor of one who has fewer is *equity*. Now, if we adopt the vulgar or less scientific meaning of that word, and will stop long enough to comprehend that meaning, can any one fail to see that no man can have a security taken from him because he has many securities, even though all are ample, any more than the rich can be compelled to share his income with the poor? His securities are his by law, and equity can deprive no man of his legal

rights. If any one wishes to know what equity means when using the phrase, "that one having two securities shall not disappoint him who has but one," let him read the decree in Arhor *v.* Laney, 2 Atk., which will be found in the noted. It means when you have got your money which you are entitled to get out of whatever security you have, and with your mode of doing this we cannot interfere, turn over the securities you no longer need to the creditor that had no claim on them, but had a claim on the one you have seen fit to exhaust, as you had a right to do." This is equity, and it is also justice. It originated when land, not being assets for simple contract creditors, a specialty creditor might exhaust the personalty and have the land free for the deed. It is rather amusing to see the rule preserved and enforced as against common creditors whose equity is precisely what that of the disappointed claimant is.

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State Taxation—Stock.

A State tax on its citizens, governed by the value of their stock in foreign corporations, is constitutional.

STATE TAXATION OF STOCK IN FOREIGN CORPORATIONS.

In one sense taxation is always on property. In another, always on persons. Its imposition reduces the property *pro tanto*. We sometimes speak of a tax, however, as being on persons, when, if the person taxed fails to pay the tax, any portion of his property will be taken to pay it; and as on property, when, if the owner fails to pay the tax out of his other property, that specific property, and that specific property alone, will be taken to pay the tax. Thus, a tax on real estate in most of the States is a tax which, if not paid by the owner for the time being, is satisfied by a sale of the real estate. An

[1] 12 Peck., 572. The following is not in strictness an annotation. It is inserted here as preparatory to the principal Editorial Note in the next or June number, on "State Taxation on Corporate Franchises."